[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12578

D.C. Docket No. 4:16-cv-00337-RSB-CLR

FREDERICK WASHINGTON,
MINI JOLITA WASHINGTON,

Plaintiffs - Appellants,

versus

THE NATIONAL SHIPPING COMPANY
OF SAUDI ARABIA, d.b.a. Bahri,

Defendant - Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

(December 17, 2020)

Before MARTIN, LUCK, and BRASHER, Circuit Judges.

MARTIN, Circuit Judge:

This case arises out of injuries Frederick Washington suffered while working as a longshoreman aboard cargo ship M/V Bahri Hofuf. Mr. Washington and his wife, Mini Jolita Washington, sued the vessel's owner, the National Shipping Company of Saudi Arabia, d/b/a Bahri ("Bahri"). Their complaint alleged negligence under § 905(b) of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 905(b), as well as common law loss of consortium. The District Court granted summary judgment to Bahri, holding that it did not violate any of the duties owed by vessels under the LHWCA. The Washingtons appeal the District Court's decision, arguing that a material question of fact remained as to whether Bahri breached its "turnover duty" of safe condition. After careful consideration and with the benefit of oral argument, we affirm the District Court's grant of summary judgment to Bahri.

I.

On August 1, 2016, the M/V Bahri Hofuf ("the Bahri") engaged SSA Stevedores ("SSA"), a stevedoring company in the Port of Savannah, to assist in discharging large steel coils weighing approximately 5.5 metric tons each. Mr. Washington, who worked as a union longshoreman at the Port of Savannah, was one of the people hired by SSA to assist with loading and unloading cargo that day.

While Mr. Washington was working on the Bahri, a trailer loaded with the steel coils uncoupled from the tractor as the tractor was pulling it up a ramp. This caused the trailer to fall or roll back down the ramp to where Mr. Washington was working. He was injured as he moved out of the way. Both the tractor and trailer involved in the accident were provided by Bahri.

A. The Equipment

As per their agreement, on the day of the accident, Bahri gave SSA the option of using certain of its own equipment in unloading operations. Bahri's contract with SSA, referred to as a Stevedore Terminal Contract, granted SSA "sole discretion" over the use of Bahri's equipment and required SSA to "determine that such equipment complies with standards set by" the Occupational Safety and Health Administration ("OSHA"). It also provided that "[a]ny equipment considered to be unsuitable to [SSA] shall not be used."

SSA determined, with input from Bahri, that it would offload the coils in part by loading them onto a Bahri-owned flatbed trailer known as a "MAFI," and pulling the MAFI off the ship by using a Bahri-owned tractor known as a "Terberg." A Terberg attaches to a MAFI using a connection hitch referred to as a "gooseneck" connector, which was also provided to SSA by Bahri.[1] The MAFI

[1] One side of the gooseneck attaches to the Terberg's fifth wheel, while the other end—referred to as the "lip"—slides into the MAFI's "gooseneck tunnel" and over an internal connecting piece

and Terberg that Bahri provided to SSA did not have any safety chains that could have acted as a secondary, emergency connection in case the Terberg and MAFI uncoupled. The only mechanism to keep the Terberg and MAFI attached was the gooseneck itself.

Aside from the Terberg-MAFI combination provided by Bahri, SSA also removed cargo that day using a leased "TICO" truck. Like a Terberg, a TICO truck is used to pull a MAFI trailer, but instead of connecting to the MAFI through a removable gooseneck connector, the TICO truck has a fixed MAFI attachment. Because the mechanism connecting the TICO tractor to a MAFI trailer is "all one piece," the TICO-MAFI combination does not utilize any safety chains. On the day of the accident, SSA alternated between using the TICO truck and the Terberg-MAFI combination to unload coils from the Bahri.

B. The Accident

Aboard the Bahri, Mr. Washington worked as a "flagman." In this capacity, he used hand signals to direct the Terberg tractor through the vessel to the appropriate loading location, and back out of the vessel once the cargo was loaded onto the MAFI trailer. Working alongside Mr. Washington were Robert Manning, a Terberg operator; Charles Hills, a forklift operator; and stevedores Daniel

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at the end of the tunnel. The gooseneck lip also has brackets on either side that fit into sockets of the gooseneck tunnel's entryway when the Terberg raises the MAFI off the ground.

Sheppard and Kevin Dotson. Mr. Sheppard and Mr. Dotson acted as supervisors for SSA during this operation.

Mr. Manning, who was meant to operate the Terberg-MAFI combination that day, expressed concern to Mr. Sheppard about the lack of safety chains connecting the Terberg tractor to the MAFI trailer. Mr. Sheppard responded that it was "fine" to use the equipment without safety chains. Mr. Dotson also assumed the equipment was safe to use because he had used it previously for the same type of operation. Notwithstanding Mr. Manning's initial concerns about the lack of safety chains, his conversation with his supervising stevedores "satisfied" him that the equipment was safe to use, and he went on to operate the Terberg-MAFI as provided.

The Terberg-MAFI combination was used to unload cargo from the Bahri for several hours that day without incident. However, during one of the Terberg-MAFI combination's final trips,[2] the MAFI uncoupled from the Terberg at the top of a four-story internal ramp. Mr. Washington was standing at the bottom of the ramp at that time. As the MAFI rolled back down, it began "jumping," emitting sparks, and shaking the entire ship. Mr. Washington tried to avoid the MAFI by stepping out of the way, but the trailer "jackknifed" straight towards him, causing

[2] Mr. Manning recalled that there were "maybe three more trips" remaining at the time the accident occurred.

him to turn and flee. Mr. Hills, who was operating a forklift at the time, saw the oncoming trailer and maneuvered his forklift in front of the MAFI to stop its momentum. As Mr. Washington ran away, a coil that the forklift was carrying hit Washington's left leg, almost causing him to fall down before he jumped to safety on the pipes behind Mr. Hills's forklift. When Mr. Washington jumped on the pipes, his shoulder hit the wall adjacent to the ramp. Mr. Hills characterized the incident as a "life and death situation."

Because at the time Mr. Washington believed he had merely sprained his knee and bruised his shoulder, he did not report his injuries right away and continued to work. However, his condition did not improve in the days that followed, so on August 30, 2016 he reported his injuries to SSA's safety director. Mr. Washington later discovered that he had suffered a double meniscus tear in his left knee, and a rotator cuff injury in his right shoulder. Due to his injuries, Mr. Washington believed it would be "very difficult" for him to return to work as a longshoreman.

C. Testimony Concerning the Use of Safety Chains

Poul Mollerup-Madsen, Bahri's Port Captain, offered three possible explanations for the accident. The first is that the MAFI was loaded incorrectly so there was too much weight on the back of the trailer, causing the MAFI to tilt backwards and detach. The second is that the MAFI and the Terberg were not

completely attached via the gooseneck, thus making it more likely that they would detach on an incline. And third, when the Terberg got to the top of the internal ramp, it did not raise its fifth wheel high enough so that the MAFI trailer could also clear the top of the ramp.

Whatever the cause of the accident, several witnesses testified that the use of safety chains likely would have avoided it. For instance, Mr. Washington's expert, Henry Milam, concluded in his report that safety chains act as a "secondary, emergency system to prevent the accidental disconnect" of a MAFI trailer. Mr. Manning, an experienced Terberg operator, similarly posited that safety chains would have avoided the accident. He said uncoupling is not uncommon when MAFI trailers are pulled up a ramp, but that when this happens, safety chains prevent the MAFI from rolling away further than the distance of the chain.

Mr. Manning also testified that he was trained to always use safety chains when operating a Terberg-MAFI combination. Other longshoremen similarly said that safety chains are generally used with Terberg trucks, and SSA policy dictates that safety chains be used on MAFI-Terberg combinations whenever available. In his expert report, Mr. Milam concluded that "best business practices" required the use of safety chains when unloading cargo using the equipment in question, and that Bahri had a "general duty" to provide equipment with safety chains. And finally, the gooseneck's operation manual provides that trailers such as the MAFI

in question should "[p]referably" be equipped with safety hooks for increased safety.

Before the accident involving Mr. Washington, cargo operations using Bahri's Terberg and MAFI had been carried out for ten years without any uncoupling incident. SSA successfully used Bahri's Terberg-MAFI combination without safety chains during previous unloading operations, and used gooseneck equipment without safety chains on the vessels of other shipping lines. Finally, neither OSHA regulations nor the MAFI operating manual required the use of safety chains.

D. Procedural History

The Washingtons filed an amended complaint against Bahri alleging negligence under § 905(b) of the LHWCA and common law loss of consortium. Bahri moved for summary judgment on both claims. The District Court granted Bahri's summary judgment motion, holding that (1) Bahri had not violated any of the duties owed by vessels under § 905(b); and (2) because Mr. Washington could not proceed on his § 905(b) claim, Bahri was entitled to summary judgment on his wife's derivative loss of consortium claim as well. Mr. Washington moved to alter or amend the District Court's summary judgment order under Federal Rule of Civil Procedure 59(e), arguing that the court failed to consider certain evidence and

misapplied the law concerning Bahri's duty under § 905(b). The District Court denied Mr. Washington's motion in full.

On appeal, Mr. Washington challenges only those parts of the District Court orders holding that Bahri satisfied the § 905(b) duty to turn over a vessel in safe condition, commonly referred to as the "turnover duty of safe condition."

II.

This Court reviews de novo the grant of summary judgment, applying the same legal standard used by the district court. Shiver v. Chertoff, 549 F.3d 1342, 1343 (11th Cir. 2008) (per curiam). Summary judgment is proper only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "In reviewing a grant of summary judgment, we resolve all ambiguities and draw reasonable factual inferences from the evidence in the non-movant's favor." Layton v. DHL Express (USA), Inc., 686 F.3d 1172, 1175 (11th Cir. 2012). We "may affirm the district court where the judgment entered is correct on any legal ground regardless of the grounds addressed, adopted or rejected by the district court." Bonanni Ship Supply, Inc. v. United States, 959 F.2d 1558, 1561 (11th Cir. 1992) (affirming grant of summary judgment).

III.

A. Bahri's Duties Under the LHWCA.

Mr. Washington brings his claim under § 905(b) of the LHCWA, which allows a longshoreman to seek damages in a third-party negligence action against the owner of the vessel on which he was injured. 33 U.S.C. § 905(b). Section 905(b) reads, in relevant part:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person . . . may bring an action against such vessel as a third party . . . . If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. . . . The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

Id.

Before § 905(b) was enacted in 1972, the LHCWA made shipowners strictly liable for injuries suffered by longshoremen due to a vessel's unseaworthiness or due to negligence. Scindia Steam Navigation Co., Ltd. v. De Los Santos, 451 U.S. 156, 164–65, 101 S. Ct. 1614, 1620–21 (1981). By abolishing claims for unseaworthiness, and instead limiting a vessel's liability to claims sounding in negligence, Congress intended to "shift more of the responsibility for compensating injured longshoremen to the party best able to prevent injuries: the stevedore-employer." Howlett v. Birkdale Shipping Co., S.A., 512 U.S. 92, 97, 114 S. Ct. 2057, 2063 (1994). Consistent with Congress's intent to limit liability

against shipowners, the Supreme Court in Scindia interpreted § 905(b) to impose three limited duties on vessels (often referred to as "Scindia duties"): (1) the "turnover duty"; (2) the "active control" duty; and (3) the "duty to intervene." Id. at 98, 114 S. Ct. at 2063 (citing Scindia, 451 U.S. at 167–78, 101 S. Ct. at 1622–23).

At issue in this appeal is the first of these duties, the turnover duty. It encompasses two separate components: the duty to turn over the ship and its equipment in safe condition, and the corollary duty to warn the stevedore of any hidden dangers. Id. at 98–99. Mr. Washington challenges only the District Court's finding as to the first component, the turnover duty of safe condition. The Supreme Court defined this duty in Howlett as requiring the ship owner to

> exercise ordinary care under the circumstances to turn over the ship and its equipment and appliances in such condition that an expert and experienced stevedoring contractor, mindful of the dangers he should reasonably expect to encounter, arising from the hazards of the ship's service or otherwise, will be able by the exercise of ordinary care to carry on cargo operations with reasonable safety to persons and property.

Id. (quotation marks omitted). At its core, the turnover duty of safe condition requires that a shipowner "turn over the ship and its equipment in a condition that permits a stevedore to do its work with reasonable safety." Roach v. M/V Aqua Grace, 857 F.2d 1575, 1581 (11th Cir. 1988).

Mr. Washington argues here that the District Court wrongly decided, as a matter of law, Bahri did not violate the turnover duty of safe condition by failing to provide safety chains with its Terberg and MAFI. According to Mr. Washington, the District Court employed "flawed reasoning" when it found that Bahri's equipment was reasonably safe because it had been used previously without incident. Mr. Washington's argument is without merit. The hazard was open and obvious and could have been avoided by a reasonably competent stevedore. Summary judgment was therefore appropriate.

B. The Hazard Was Open and Obvious and Could Have Been Avoided By a Reasonably Competent Stevedore.

Our caselaw has developed since the close of briefing in this case. At the time of the proceedings before the District Court, this circuit had not yet decided whether failure to eliminate an open and obvious hazard can constitute breach of a shipowner's duty to turn over a vessel in safe condition. Analyzing caselaw from other circuits, the District Court declined to adopt an open-and-obvious defense. However, since the conclusion of briefing in this appeal, this Court has expressly done so, allowing an open-and-obvious defense for negligence claims under the turnover duty of safe condition. Troutman v. Seaboard Atl. Ltd., 958 F.3d 1143, 1146 (11th Cir. 2020). Troutman held that "generally, a shipowner does not breach [its duty to turn over a vessel in safe condition] when the injurious hazard

was open and obvious and could have been avoided by a reasonably competent stevedore." Id. Troutman applies to this case.

The parties do not dispute that the Terberg-MAFI combination, without safety chains, was an open and obvious hazard. Mr. Manning, the Terberg operator, not only realized that the equipment lacked safety chains, but also raised concerns with his supervising stevedores before beginning operations. Even after being notified of Mr. Manning's concerns, SSA approved the use of Bahri's equipment.

While the open-and-obvious defense is "not absolute," id., the hazard here does not fall into any exception to the defense. In Troutman, a longshoreman was injured when he fell from a walkway on the upper deck of a ship—because the cargo adjacent to the walkway had not yet been loaded, Mr. Troutman fell all the way to the deck below. Id. at 1145. We rejected Mr. Troutman's argument that, because the walkway was "inherently unsafe," the open-and-obvious defense did not apply. Id. at 1148. We held instead that Mr. Troutman could have "avoid[ed] the hazard" by waiting to use the walkway until after the adjacent cargo was loaded. Id.

In a similar way, SSA could have avoided the hazard here. Under the terms of their contract, SSA had "sole discretion" over the use of Bahri's equipment and it was SSA that was required to "determine that such equipment complies with

standards set by [OSHA]." The contract also provided that "[a]ny equipment considered to be unsuitable to [SSA] shall not be used." In other words, SSA could have avoided the hazard by using other equipment and SSA was not required to use Bahri's Terberg-MAFI if it determined doing so would be unsafe. Indeed, on the day of the accident, SSA alternated between using the Terberg-MAFI and a TICO truck that does not require safety chains. Exclusive use of the TICO truck would have avoided the hazard completely.[3] Beyond that, Bahri's Port Captain testified that the accident was caused by operational error, not any inherent unsafe nature of the equipment. The hazard was thus open and obvious and, as in Troutman, it could have been avoided by a reasonably competent stevedore.

The undisputed facts therefore show that Bahri satisfied its legal duty to turn over the M/V Bahri Hofuf in safe condition. The District Court did not err in granting summary judgment to Bahri.

IV.

For these reasons, we **AFFIRM** the District Court's grant of summary judgment to Bahri.

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[3] For the first time on appeal, Bahri argues that "perhaps the most important circumstance" supporting the District Court's holding is "undisputed testimony" that the Terberg-MAFI combination "can be safely driven in reverse, such that the MAFI trailer is pushed up the internal ramps of the ship in front of the Terberg." We do not read this referenced testimony to be so clear. Mr. Manning testified that driving the equipment in reverse was "possible" but that he "[didn't] know if it was feasible." In any event, our ruling does not change as a result of this testimony.